IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 86 of 1995

with

CRIMINAL APPEAL No 87 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE H.H.MEHTA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

o

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BHURIBEN DILIPBHAI VASAVA

Versus

STATE OF GUJART

Appearance:

1. Criminal Appeal No. 86 of 1995
MR J.M. Budhbhatti for the appellant
K.T. Dave, APP, for Respondent No. 1

2. Criminal Appeal No. 87 of 1996
MR EE SAIYED for the appellant
K.T. Dave, APP for Respondent No. 1

CORAM : MR.JUSTICE M.H.KADRI
and
MR.JUSTICE H.H.MEHTA

Date of decision: 02/08/2003

ORAL COMMON JUDGEMENT

(Per : MR.JUSTICE M.H.KADRI)

1. Criminal Appeal No.86 of 1995 was filed by the original accused No.2, Bhuriben Dilipbhai Vasava, whereas Criminal Appeal No.87 of 1996 was filed by the original accused No.1, Punambhai @ Babarbhai Chhaganbhai, challenging their conviction under Section 302 read with 34 of the Indian Penal Code and the sentence imposed on them to undergo R.I. for life and fine of Rs.100, in default S.I. for one month, recorded by the learned Additional Sessions Judge, Bharuch, in judgment and order dated January 7, 1995, in Sessions Case No.211 of 1994.

2. As the common question of facts and law are involved in both these appeals, and as they arose from one judgment and order, they are disposed of by this common judgment.

3. Briefly stated, the prosecution case is as under: Complainant, Riteshbhai, along with his wife, Shardaben, was residing in a hutment called Kasak situated near Golden Bridge, Bharuch. The accused No.2, Bhuriben, is the sister of the accused No.1, Punambhai @ Babarbhai Chhaganbhai. The appellants, along with the children of Bhuriben, were residing in the neighbourhood of the complainant, Riteshbhai. No child was born out of the wedlock of the complainant, Riteshbhai, and Shardaben. The appellant, Bhuriben, was teasing Shardaben that she was a barren woman and was incapable of producing a child. The appellant, Bhuriben, was also causing harassment to Shardaben and her husband, Riteshbhai, by taunting and by creating hurdles by throwing thorns on the way to their hut. The incident in question had taken place at 8.00 p.m. on June 30, 1994, near the hut of the complainant, Riteshbhai. The complainant had gone to buy beedi at the shop of Sirajbhai which was situated near his hut. At that time, his wife, Shardaben, had come running by shouting 'bachao-bhacho'. She was burning with flames and, therefore, the complainant had wrapped her body by his shirt. A quilt was brought from the shop of Sirajbhai and she was wrapped under the quilt. One Chandubhai had come to the rescue of the complainant and Shardaben. With the help of said Chandubhai, Shardaben was taken to the Civil Hospital, Bharuch. Shardaben was admitted in the Civil Hospital, Bharuch, due to the burn injuries sustained by her. It is the prosecution case that the accused No.1, Punambhai @ Babarbhai Chhaganbhai, had caught hold of Shardaben and accused No.2, Bhuriben, had poured kerosene on Shardaben and set her ablaze. On the way to the Civil Hospital, Bharuch, Shardaben had

narrated the incident to the complainant and involvement of two accused in catching hold of her and setting her ablaze. Shardaben was examined at Bharuch Civil Hospital, by P.W.5, Dr. A.M. Mandaliya. Before Dr. A.M. Mandaliya, Shardaben had made oral declaration by narrating the history of the incident wherein she had stated that the accused No.1 Punambhai @ Babarbhai Chhaganbhai, had caught hold of her and accused No.2, Bhuriben, had poured kerosene and set her ablaze. An information was sent to Bharuch City Police Station by the duty Constable present at the Civil Hospital with regard to the burn injuries sustained by Shardaben. The police personnel had come to the Civil Hospital on receipt of the information received from the Civil Hospital and had recorded First Information Report of the complainant, Riteshbhai, and an offence was registered at C.R.No.I-182 of 1994 of Bharuch City Police Station against the appellants for the offence punishable under Sections 302 and 34 of the Indian Penal Code. Yadi was sent to the Executive Magistrate to record dying declaration of Shardaben. P.W.2, Surendra Thakorelal Vanza, Executive Magistrate, attached to the Mamlatdar Office, Bharuch, had received the yadi to record dying declaration of Shardaben at 10.30 p.m. P.W.2, Vanza, had gone to the Civil Hospital, and had recorded dying declaration of Shardaben between 11.15 p.m. and 11.25 p.m. An endorsement of Dr. A.M. Mandaliya, was obtained on the dying declaration that Shardaben was conscious and in a fit state of mind to give her statement. P.W.9 P.I. G.N. Chavda, of Bharuch City "A" Division Police Station, was entrusted with the investigation of C.R. No.I-182 of 1994. At 12.30 a.m. P.I. G.N. Chavda, had recorded the statement of injured, Shardaben. In her statement, she had stated that the accused No.1 Punambhai @ Babarbhai Chhaganbhai, had caught hold of her and accused No.2, Bhuriben, had poured kerosene and set her ablaze. The clothes of injured, Shardaben, were seized under a panchanama. P.I. G.M. Chavda had visited the place of the incident and had drawn the panchanama and had collected incriminating articles. He had recorded statements of witnesses residing in the neighbourhood of the hut of the complainant. The appellants came to be arrested on July 1, 1994. Shardaben had succumbed to the burn injuries on July 2, 1994 around 2.30 a.m. and inquest was held and, thereafter, the dead body of Shardaben was sent for post-mortem. P.W.6, Dr. Hina Thakor, Medical Officer, Civil Hospital, Bharuch, had performed post-mortem of the deceased from 10.40 a.m. to 12 noon. P.I, Chavda, had sent incriminating articles and clothes of the deceased to the Forensic Science Laboratory ('FSL' for short) for

analysis. On receipt of the report from the FSL, and after collecting the post-mortem notes, chargesheet for the offences punishable under Sections 302 and 34 of the Indian Penal Code was submitted by P.I. Chavda, in the Court of the learned Judicial Magistrate, First Calss, Bharuch, which came to be registered as Criminal Case No.18404 of 1994. As the offence under Section 302 of the Indian Penal Code is exclusively triable by Court of Sessions, the learned Judicial Magistrate, First Class, Bharuch, has committed the case to the Court of Sessions, Bharuch, where it came to be numbered as Sessions Case No.211 of 1994.

4. Charge Exh.2 was framed against the appellants for the offences punishable under Sections 302 and 34 of the Indian Penal Code. The charge was read over and explained to the appellants wherein they pleaded not guilty and claimed to be tried. The prosecution, in order to prove the charge framed against the appellants, had examined:
(1) P.W.1, complainant, Riteshbhai Ishwarbhai Vasava, at Exh.6;
(2) P.W.2, Executive Magistrate, Surendra Thakorelal Vanza, at Exh.8;
(3) P.W.3, Siraj Mohammad Shokat Ali, at Exh.12
(4) P.W.4, Kokilaben Raman Vasava, at Exh.22
(5) P.W.5, Dr. A.M. Mandaliya, of Civil Hospital, Bharuch, at Exh.23
(6) P.W.6, Dr. Hina Madhusudan Thakor, Medical Officer, of Civil Hospital, Bharuch, at Exh.26;
(7) P.W.7, Police Constable, Khushalbhai Mohanbhai, at Exh.28;
(8) P.W.8, Maganbhai Dungarji Thakor, PSO of Bharuch City "A" Division Police Station, at Exh.30
and
(9) P.W.9, Gopalbhai Nathabhai Chavda, PI, of Bharuch City "A" Division Police Station, at Exh.31.
The prosecution had also produced documentary evidence such as First Information Report at Exh. 7, yadi received by the Executive Magistrate at Exh.9, dying declaration of deceased Shardaben, at Exh.11, panchanama of scene of offence at Exh.14, panchanama of seizure of clothes of the deceased at Exh.15, inquest panchanama at Exh.17, report of the FSL at Exh.21, injury certificate of deceased Shardaben at Exh.24, case papers of deceased Shardaben of Bharuch Civil Hospital at Exh.25, post-mortem notes at Exh.27, and copy of entry of station diary of Bharuch City 'A' Division Police Station, sent by Head Constable, Khushalbhai Mohanbhai, from Bharuch Civil Hospital, at Exh.29, to prove the charge against the appellants.

5. After the evidence of the prosecution was over, the appellants were questioned generally and their statements came to be recorded under Section 313 of the Code of Criminal Procedure. In their further statements, they have stated that a false case was filed by the complainant and the deceased had committed suicide by burning herself. However, no witness in defence was examined by the appellants. The defence of the appellants was of general denial.

6. The learned Additional Sessions Judge, on appreciation of oral as well as documentary evidence and the arguments advanced by the learned Additional Public Prosecutor and the learned advocate for the appellants, has held as under:

(i) The prosecution has proved beyond doubt that the deceased Shardaben had died homicidal death.

(ii) It was proved by the prosecution beyond doubt that the accused No.1, Punambhai @ Babarbhai Chhaganbhai, had caught hold of Shardaben and accused No.2, Bhuriben, had poured kerosene on Shardaben and, by lighting a match-stick, set her ablaze.

On the basis of the abovereferred to conclusions, the learned Additional Sessions Judge, has convicted the appellants under Section 302 read with 34 of the Indian Penal Code and sentenced to undergo R.I. for life and fine of Rs.100, in default S.I. for one month, which has given rise to filing of these two appeals by the appellants.

7. Learned advocate, Mr. J.M. Budhbhatti, for the appellant of Criminal Appeal No.86 of 1995, Bhuriben Dilipbhai Vasava, and learned advocate, Mr. E.E. Saiyad, for the appellant of Criminal Appeal No.87 of 1996 Punambhai @ Babarbhai Chhaganbhai, and learned APP, Mr. K.T. Dave, have taken us through the entire record and proceedings of the Sessions Case. we have minutely gone through the entire oral as well as documentary evidence with a view to reappreciate it.

8. Learned advocates for the appellants have submitted that there was no motive or reason on the part of the appellants to commit murder of the deceased, Shardaben. It is submitted that the deceased had committed suicide and the complainant, Riteshbhai, with a view to take revenge on them, had involved the appellants

with the commission of death of the deceased Shardaben. It is submitted that no independent witnesses, even though available residing in the neighbourhood, were examined by the prosecution and, therefore, the real genesis of the occurrence of the incident was suppressed by the prosecution, for which an adverse inference is required to be drawn against the prosecution and benefit of doubt be given to the appellants, and the appeals be allowed, and the conviction and sentence be quashed and set aside.

9. On the other hand, learned APP, Mr.K.T. Dave, has submitted that there was an enmity between the deceased, Shardaben, and the appellant, Bhuriben, and Bhuriben was harassing and taunting the deceased being a barren lady and causing harassment to the deceased as well as the complainant. It is submitted that, because of enmity between the two families, the accused No.1 Punambhai @ Babarbhai Chhaganbhai, had caught hold of Shardaben and accused No.2, Bhuriben, had poured kerosene and set her ablaze, when she was alone in her hut. It is submitted by the learned APP that the deceased had made oral dying declarations before the complainant and before Dr. A.M. Mandaliya, which were also corroborated by the case papers in which the history of assault was recorded which was further corroborated by the dying declaration recorded by the Executive Magistrate, Mr. Vanza. It is submitted that all the dying declarations - oral as well as documentary - were consistent and had only pointed to the guilt of the appellants with the commission of the murder of the deceased Shardaben. It is submitted that the prosecution had proved the guilt of the appellants beyond doubt and, therefore, the appeals be dismissed and the sentence be confirmed.

10. The evidence of P.W.6, Dr. Hina Thakor, Medical Officer, of Civil Hospital, Bharuch, who had performed the post-mortem of the deceased, and the post-mortem notes at Exh.27, had proved beyond doubt that the deceased had died due to burn injuries sustained by her during the incident. In the post-mortem notes at Exh.27, the cause of death, as opined by P.W.6, Dr. Hina Thakor, was:

"In my opinion, the cause death was shock following extensive burns."

In view of the evidence of P.W.6, Dr. Hina Thakor, and post-mortem notes at Exh, 27, which are further corroborated by the oral testimony of P.W.5, Dr. A.M. Mandaliya, and certificate at Exh.24, the prosecution had proved beyond doubt that the deceased had died due to

burn injuries which were sufficient in the ordinary course of nature to cause death. Therefore, we are of the opinion that the finding of the learned Additional Sessions Judge that the deceased Shardaben had died homicidal death, deserves to be confirmed.

11. The submission of the learned advocates for the appellants that there was no motive on the part of the appellants to commit the murder of the deceased Shardaben deserves to be rejected. The evidence of the complainant, Riteshbhai, and the dying declarations of the deceased had proved beyond doubt that the appellant, Bhuriben, was causing harassment to the complainant and the deceased Shardaben while taunting her as a barren lady, and was causing nuisance and annoyance by throwing thorns on the way to their hut, which had led their relation being strained. The appellants, with a view to get rid of the deceased, had taken advantage of the situation when the deceased was alone in the hut and had caught hold of her and set her ablaze. Therefore, we are of the view that there was motive on the part of the appellants to commit the murder of the deceased Shardaben because of enmity between the appellants and the deceased.

12. After the deceased was set ablaze, she had run out of the hut. The complainant, Riteshbhai, who was buying beedi at the shop of Sirajbhai, had covered the deceased with his shirt and with the quilt which he had brought from the shop of Sirajbhai. When the deceased was taken to the Civil Hospital, Bharuch, she had narrated how the incident had taken place and the role played by each of the appellants. The said declaration, after the death of the deceased, had become a dying declaration in view of the provision of Section 32 of the Indian Evidence Act. At the time of admission in the Civil Hospital, Bharuch, the deceased had narrated the history of the incident before P.W.5, Dr. Dr. A.M. Mandaliya, which was entered in the case papers of the Civil Hospital, Bharuch, produced at Exh.25. In the certificate at Exh.24, which was issued by the Civil Hospital, Bharuch, with regard to the injuries sustained by the deceased, the history of the incident was also recorded, wherein, it was stated that accused No.1, Punambhai @ Babarbhai Chhaganbhai, had caught hold of Shardaben and accused No.2, Bhuriben, had poured kerosene on Shardaben and set her ablaze. The above declaration is further corroborated by the dying declaration recorded by the P.W.2, Executive Magistrate, Surendra Thakorebhai Vanza. Before recording the dying declaration, P.W.6, Vanza, had satisfied himself that the patient was

conscious, in a fit state of mind and well oriented to give her statement. After recording the dying declaration, again, an endorsement of P.W.5, Dr. A.M. Mandaliya, was obtained with regard to the condition of the deceased. In the dying declaration at Exh.11 also, the involvement of the appellants committing the murder of the deceased was proved. The deceased had also stated in her dying declaration at Exh.11 that the appellant, Bhuriben, was taunting her as a barren lady and was causing harassment to her. It is well settled principle that a dying declaration is admissible in evidence on the principle of necessity and can form the basis for conviction if it is found to be reliable. We are satisfied that the dying declarations made by the deceased before the complainant, and P.W.5, Dr. A.M. Mandaliya, are trust-worthy and reliable. The said dying declarations are further corroborated by the dying declaration recorded by the P.W.2, Executive Magistrate, Surendra Thakorebhai Vanza, which was produced at Exh.11. The dying declarations had satisfied all the tests laid down by the Apex Court in various decisions.

13. The appellants, taking advantage of the fact that Shardaben was alone in the hut, had trespassed in her hut. The appellant, Punambhai @ Babarbhai Chhaganbhai, had caught hold of Shardaben, and the appellant, Bhuriben, had poured kerosene on Shardaben and set her ablaze. The acts committed by the appellants were dangerous and they had full knowledge and intention that their acts of pouring kerosene on Shardaben and setting her ablaze were likely to cause her death. The medical evidence of P.W.5, Dr. A.M. Mandaliya, and P.W.6, Dr. Hina Thakor, corroborated by the case papers of the Civil Hospital and the post-mortem notes, had proved beyond doubt that the burn injuries sustained by the deceased, which were of 90% to 95%, were sufficient in the ordinary course of nature to cause death. On reappreciation of evidence, we are satisfied that there is no infirmity in the findings recorded by the learned Additional Sessions Judge for convicting and sentencing the appellants.

14. As a result of foregoing reasons, both the appeals are dismissed. The conviction of the appellants, Bhuriben Dilipbhai Vasava (original accused No.2) and Punambhai @ Babarbhai Chhaganbhai (original accused No.1), under Section 302 read with 34 of the Indian Penal Code and the sentence imposed on the appellants to undergo R.I. for life and fine of Rs.100, in default S.I. for one month, recorded by the learned Additional Sessions Judge, Bharuch, in judgment and order dated

January 7, 1995, in Sessions Case No.211 of 1994, are confirmed. The appellant of Criminal Appeal No.86 of 1995, Bhuriben Dilipbhai Vasava, is on bail pursuant to the Oral Order dated August 7, 2000 passed by a Division Bench of this Court in Criminal Misc. Application No.4125 of 2000. Her bail bonds shall stand cancelled. The appellant of Criminal Appeal No.86 of 1995, Bhuriben Dilipbhai Vasava, is directed to surrender to custody to serve the rest of the sentence, forthwith. The muddamal be destroyed as per the directions given by the learned Additional Sessions Judge, in the impugned judgment and order.

August 2, 2003 (M.H. Kadri, J.)

(H.H. Mehta,J.)

(swamy)
PPS